No. 88-97

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

FORD MOTOR COMPANY,
Petitioner,

vs.

GARY BRYANT,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Can a state pleading practice permitting a plaintiff to name allegedly unknown defendants charged with no actionable conduct foreclose the right of removal based on diversity of citizenship under federal law?

2. In state cases that include fictitious Doe defendants, does the 30 days within which a case must be removed, 28 U.S.C. § 1446(b), commence only after the plaintiff drops the Does or the trial commences without service of the Does even though the statute provides that removability otherwise may appear through "receipt of an amended pleading, motion, order or other paper?" *Id.*

3. Where a state case that includes fictitious Doe defendants is removed without challenge, and the district court disregards the Does (no formal order of dismissal) in rendering judgment for the named defendant, must the judgment be vacated and the case remanded to state court?

PARTIES

The parties to this action are Gary Bryant, an individual, and Ford Motor Company ("Ford"), a corporation, the parties listed in the caption. Ford's corporate subsidiaries and affiliates are listed in Appendix C to the Petition for Certiorari.

The Complaint also listed as defendants "Does 1-50," but did not describe or otherwise identify them, or charge them with any actionable conduct. Following judgment plaintiff asserted that three other corporations, City Ford Company, General Seating and Sash Company, and Grumman-Olson Company also should be parties. Ford, the petitioner here, is unaware of the existence of any corporate subsidiaries or affiliates of those entities.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Petitioner Ford Motor Company respectfully urges this Court to reverse or vacate the decision of the United States Court of Appeals for the Ninth Circuit, and to reinstate the Judgment of the district court.

OPINIONS BELOW

The Amended Opinion of the Ninth Circuit vacating the judgment of the district court is reported in 844 F.2d 602 (9th Cir. 1988), and appears as Appendix A to the Petition for Certiorari. The district court's Summary Judgment was unreported, and appears as Appendix B to the Petition; no findings or conclusions were entered.

JURISDICTION

Ford based jurisdiction in the district court on 28 U.S.C. § 1441, asserting that the action, originally brought in state court, could have been brought in federal court pursuant to 28 U.S.C. § 1332, and was timely removed. The jurisdiction of this court rests on 28 U.S.C. § 1254(1), since this is an action in which a court of appeals has rendered a final judgment. After consideration by a panel of the Ninth Circuit, and rehearing by a limited *en banc* panel under Ninth Circuit Rule 35-3, a timely Petition for Rehearing by the full court of appeals was made. The Ninth Circuit then amended its opinion and denied rehearing on April 15, 1988. The Petition for Certiorari was filed on July 14, 1988, within the 90 days allowed by 28 U.S.C. § 2101. On October 3, 1988, this Court granted the Petition.

STATUTES INVOLVED

This case involves 28 U.S.C. §§ 1332, 1441, 1446, 1447, and California Code of Civil Procedure Sections 474 and 583.210 (formerly 581(a)), the pertinent portions of which are set forth in Appendix A to this brief. Congressional legislation supplementing 28 U.S.C. §§ 1441, 1446, and 1447, pursuant to the Judicial Improvements and Access to Justice Act, H.R. 4807, 100th Cong., 2d Sess., *printed in* 134 CONG. REC. H 10430 *et seq.* (daily ed. Oct. 19, 1988), is reflected in Appendix B.

STATEMENT OF THE CASE

On March 1, 1983, respondent Gary Bryant, a citizen of California, was involved in an automobile accident while driving a 15-year old van. Nearly a year later he sued Ford, not a citizen of California, in Los Angeles Superior Court, alleging breach of warranty, negligence, and strict

liability. The gravamen of the Complaint was that the vehicle Bryant drove was defective in some unspecified manner. Bryant sued no other defendants by name. (J.A. 7-14.)

Bryant did, however, also list as defendants "Does 1-50." His Complaint contained no factual allegations that any particular Doe engaged in any particular conduct. Rather, in conclusory terms, and on "information and belief," Bryant alleged that each Doe was "legally responsible, negligently or in some other actionable manner" for events referred to in the Complaint, and that all defendants, including all Does, were the "agents, servants, employees and/or joint venturers of their co-defendants" and were acting within the course and scope of such agency, employment or joint venture. (J.A. 7-8.)

Within 30 days of receiving the summons and complaint, Ford filed its verified petition for removal, and served the petition upon Bryant. (J.A. 15-24.) Ford alleged that there were no factual averments against the Does and that allegations against the Does were sham. (J.A. 17.) Ford's verified contentions went unanswered by Bryant who neither objected to removal nor moved to remand. Consequently, the case went forward in federal court. There, discovery disclosed that Bryant actually complained of a defective seat and seat belt restraint system. (J.A. 64-67.) When Ford demonstrated that it manufactured only the chassis, and did not manufacture or install the seat or seat belt restraint system, the district court granted summary judgment in Ford's favor. (J.A. 135-136.)

At the time judgment was entered, Bryant had made no motion contesting the district court's jurisdiction. Nor had he sought to add additional parties by amendment, despite mention in his court papers that he intended to name the Does when he later discovered their identities.

Following entry of judgment, he did move to add three entities as defendants, City Ford Company, General Seating and Sash Company, and Grumman-Olson Company. (J.A. 144-152.) Two of these entities allegedly were California corporations, which, had they been parties when the action was filed, would have destroyed diversity and prevented removal. The district court denied Bryant's motions to add parties post-judgment, finding that Bryant knew of these parties prior to judgment but nevertheless had made no motion concerning them, and that there was no excusable neglect under Federal Rules of Civil Procedure 60(b) for the delay in bringing those entities to the Court's attention. (J.A. 173-175.)

On appeal, the Ninth Circuit vacated the judgment and ordered the District Court to remand the action to state court. *Bryant v. Ford Motor Co.*, 844 F.2d 602 (9th Cir. 1987) (en banc) (as amended on denial of Rehearing and Rehearing En Banc April 15, 1988). In its opinion, the Ninth Circuit overruled four prior Ninth Circuit opinions, and created a new "bright line" rule for determining when the presence of fictitious Doe defendants destroys diversity of citizenship, thereby preventing removal. Under this new "bright line" rule, unless a plaintiff substitutes real persons for such Does or the Does are dismissed, a case containing such Does in the caption — no matter whether it be 1 Doe or 100 Does — can be removed *only* if the plaintiff unequivocally abandons the Does. *Id.* at 605-06. Unequivocal abandonment, the Ninth Circuit held, "occurs in only two situations: (1) where the plaintiff drops the Doe defendants from the complaint or (2) where the trial commences without service of the Doe defendants." *Id.* 844 F.2d at 606 n.5. Finally, the Court made its new "bright-line" rule applicable to all pending cases, *id.* at 606 n.7, requiring all courts within the Ninth Circuit to remand cases which had been removed with Does in the Complaint.

SUMMARY OF ARGUMENT

A pleading practice under state law whereby a plaintiff may sue fictitious Doe defendants does not prevent removal to federal court based on diversity of citizenship. Removability turns not on the nature of a state's practice, which raises a question of state law, but rather on whether federal jurisdiction exists, which presents a question of federal law.

Recently, Congress passed legislation which will supplement the removal statutes and make clear that the opinion of the Court of Appeals should be reversed or vacated. As passed by Congress, the bill explicitly states that "[f]or purposes of removal . . . the citizenship of defendants sued under fictitious names shall be disregarded." Judicial Improvements and Access to Justice Act, H.R. 4807, 100th Cong., 2d Sess. § 1016(a), *printed in* 134 Cong. Rec. H 10438 (daily ed. Oct. 19, 1988). As of the date this brief is printed the bill is before the President. Petitioner will promptly advise the Court when the President acts on the bill.

Assuming enactment, this new law will govern the disposition of this case. *Andrus v. Charlestone Stone Products Co., Inc.,* 436 U.S. 603, 607 n.6 (1978); *Bradley v. School Board of City of Richmond,* 416 U.S. 696, 711 (1974); *United States v. Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110 (1801). Accordingly, the Court of Appeals' opinion, which held that "the presence of Doe defendants under California Doe Defendant law destroys diversity and, thus, precludes removal," *Bryant,* 844 F.2d at 605, then must be reversed; Congress has stated exactly the contrary.

Even without consideration of the new law, however, it is clear that state court Doe pleading cannot preclude removal. Fictitious Doe defendants are a device under

California state court pleading which allows plaintiffs to add defendants after the action is filed and have the amendment relate back to the time of filing. Under federal law, however, removability is determined by the facts at the time of the Complaint, *Barney v. Latham,* 103 U.S. 205 (1881). The fact that parties might be added later does not prevent removal. *Wayne Chemical v. Columbus Agency Service Corp.,* 426 F.Supp. 316, 318 (N.D.Ind. 1977). Furthermore, nominal or fraudulently-joined defendants must be disregarded for the purposes of removal, *Salem Trust Co. v. Manufacturers' Finance Co.,* 264 U.S. 182 (1924); *Wilson v. Republic Iron & Steel Co.,* 257 U.S. 92 (1921). Doe defendants who do not exist at the time of removal can hardly enjoy a higher status than existing parties who are nominal or fraudulently-joined.

To allow a state to prevent removal by the expedient of Doe defendants undercuts the very basis for removal in diversity cases. Diversity jurisdiction under the Constitution and the statutes provides a neutral forum in the event of perceived state court partiality. THE FEDERALIST, No. 80, at 478 (A. Hamilton) (New Am. Library Ed. 1961); S. REP. No. 1830, 85th Cong., 2d Sess., *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS, 3099, 3102. Plaintiffs may choose the neutral forum when they commence actions, defendants when they remove them. Allowing a state, which a defendant may perceive to be partial, to nevertheless prevent removal defeats the purpose of the legislation. Other state efforts to curtail removal have been rebuffed. *E.g., Harrison v. St. Louis & San Francisco R.R. Co.,* 232 U.S. 318 (1914).

The Court of Appeals erred too in holding that the time for removal must be postponed in accordance with state law. Federal law provides that removal must occur within 30 days of the case's becoming removable, 28 U.S.C. § 1446(b). Under the Ninth Circuit's opinion, however, a

case cannot be removed until the Does have been abandoned or formally dismissed within the strictures of state statutes, which often takes several years after the filing of the action. The legislative history of the removal statutes, combined with the prior decisions of this Court and the recent congressional bill, all demonstrate instead that Congress intended that removal occur early, not late.

Finally, the removal statutes and the decisions of this Court demonstrate that infirmities in removal must be dealt with before judgment. After judgment a different standard applies. The Ninth Circuit, however, applied a pre-judgment standard to a belated post-judgment attempt to add defendants, and on that basis required remand to the state court. But the district court's jurisdiction existed at the time of judgment. Infirmities which had not been raised earlier, and attempts to add parties post-judgment, cannot *ex post facto* invalidate jurisdiction.

ARGUMENT

I.

A RECENT CONGRESSIONAL BILL REQUIRES THAT THIS COURT REVERSE OR VACATE THE DECISION OF THE NINTH CIRCUIT AND REINSTATE THE JUDGMENT OF THE DISTRICT COURT.

Congress recently has passed a bill which, if it becomes law, will answer the questions raised by this action without consideration of further argument. As a result of the new law, this Court should reverse or vacate the opinion of the Court of Appeals, and reinstate the Judgment of the District Court.

On October 19, 1988, Congress passed the Judicial Improvements and Access to Justice Act, H.R. 4807,

100th Cong., 2d Sess., *printed in* 134 Cong. Rec. H 10430 *et seq.* (daily ed. Oct. 19, 1988) ("Judicial Improvements Act"). Title X of that act contains provisions pertinent here, the most important of which says that fictitious defendants do not prevent removal based on diversity of citizenship:

> SECTION 1016. IMPROVEMENTS IN REMOVAL PROCEDURE.
>
> (a) ACTIONS REMOVABLE GENERALLY. — Section 1441(a) [of Title 28] is amended by adding at the end thereof the following new sentence: "For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded."

Other provisions of the new law also respond to problems raised by state court Doe pleading. The fear that actions could be removed after years in state court is dealt with by amending the statute to provide a one-year cap on the time when an action may be removed, notwithstanding that the case becomes removable thereafter. *Id.*, § 1016(b)(2)(B). The concern that a plaintiff could allow a case to be fully prosecuted in federal court and then move to remand is dealt with in two ways: (1) by requiring the plaintiff to move to remand within 30 days following removal; and (2) by changing 28 U.S.C. § 1446(c), which previously had required remand if, prior to judgment, it appeared that an action "had been removed improvidently and without jurisdiction," to require remand instead only if, prior to judgment, it appears that the district court "lacks subject matter jurisdiction." *Id.* § 1016(c)(1). A final change provides that a plaintiff may move to add additional defendants following removal and empowers the district court, if it decides joinder otherwise is appropriate, to then remand the action to state court. *Id.*, § 1016(c)(2).

The legislative history makes clear that these statutory provisions address the very problems confronted by the Ninth Circuit in the within case:

> Subsection (a) amends 28 U.S.C. 1441(a) to permit the citizenship of fictitious defendants to be disregarded. This amendment addresses a problem that arises in a number of states that permit suits against "Doe" defendants. The primary purpose of naming fictitious defendants is to suspend the running of the statute of limitations. The general rule has been that a joinder of Doe defendants defeats diversity jurisdiction unless their citizenship can be established, or unless they are nominal parties whose citizenship can be disregarded even if known. This rule in turn creates special difficulties in defining the time for removal. Removal becomes possible when the Doe defendants are identified or dropped, perhaps as late as the start of trial, or when it becomes clear that any claims against the Doe defendants are fictitious or merely nominal. At best, the result may be disruptive removal after a case has progressed through several stages in the State court. At worse, [sic] the result may be great uncertainty as to the time when removal becomes possible, premature attempts to remove and litigation over removability, and forfeiture of the removal opportunity by delay after the point that in retrospect seems to have made clear the right to remove. These problems can be avoided by the disregard of fictitious defendants for purposes of removal. Experience in the district courts in California, where Doe defendants are routinely added to state court complaints, suggests that in many cases no effort will be made to substitute real defendants for the Doe defendants, or the newly identified defendants will not destroy diversity. If the plaintiff seeks to substitute a diversity-destroying defendant

> after removal, the court can act as appropriate under proposed § 1447(d) to deny joinder, or to permit joinder and remand to the State court.

H.R. REP. No. 100-89, 100th Cong., 2d Sess. 71 (1988); *see also, id.* at 72-73.

The House Report was referenced on the floor of the House when the bill was passed. 134 CONG. REC H 10441 (daily ed. Oct. 19, 1988.) The analysis contained therein, and referenced above, also was made part of the record before the Senate approved the bill. 134 CONG. REC. S. 16308 (daily ed. Oct. 14, 1988.)

With this legislation, Congress unequivocally has determined that Doe pleading does not invalidate removal jurisdiction. When signed, this new legislation on jurisdiction will apply to this case pending before the Court on direct review. *Andrus v. Charlestone Stone Products Co., Inc.,* 436 U.S. 603, 607 n.6 (1978); *United States v. Alabama,* 362 U.S. 605, *reh'g denied,* 363 U.S. 857 (1960); *United States v. Union Gas Co.,* 832 F.2d 1343, 1357 (3d Cir. 1987), *cert. granted,* 108 S.Ct. 1219 (1988); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.,* 805 F.2d 1074, 1082-83 (1st Cir. 1986); *Phillips Petroleum Co. v. United States Environmental Protection Agency,* 803 F.2d 545, 551 (10th Cir. 1986); *Rubin v. Belo Broadcasting Corp.,* 769 F.2d 611, 614 (9th Cir. 1985); *Carlton v. BAWW, Inc.,* 751 F.2d 781, 787 n.6 (5th Cir. 1985).

The requirement that the Court apply the jurisdictional statutes in force at the time of decision grows from venerable authority. Chief Justice Marshall first announced the general rule that "if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied . . . [T]he court must decide according to existing laws

..." *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). Since then, this Court has reaffirmed that when legislative changes occur while a case is pending on direct review a court shall "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Board of City of Richmond,* 416 U.S. 696, 711 (1974); *accord, Thorpe v. Housing Authority of City of Durham,* 393 U.S. 268, 281-82 (1969).

By the time of decision here, the law if signed emphatically will provide that (1) the existence of Doe defendants does not deprive the district court of subject matter jurisdiction in cases removed based on diversity of citizenship; (2) challenges to the procedures for removal must be made within 30 days of removal; and (3) that the district court shall remand only if it appears before judgment that subject matter jurisdiction is lacking. The Ninth Circuit's opinion conflicts with each of these points. Now, without doubt, it is clear that the Court of Appeals' decision does not correctly state the law, that it should be reversed or vacated, and that the judgment of the district court should be reinstated.

II.

IN ANY EVENT, THE CALIFORNIA DOE DEFENDANT PLEADING PRACTICE CANNOT DEPRIVE THE FEDERAL COURTS OF REMOVAL JURISDICTION.

A. The Court Must Apply Federal, Not State Law

The recent congressional declaration that fictitiously named defendants are to be disregarded for removal purposes reinforces the decisions of this Court and is consistent with the statutes even before they were supple-

mented. Since the Judiciary Act of 1789, 1 Stat. 79 (1789), Congress has provided that a case commenced in state court could be removed to federal court if the federal court had subject matter jurisdiction. The question always has been whether the federal court had subject matter jurisdiction. That is a question of federal law. *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 705 (1972). Moreover, federal jurisdiction is to be tested on the facts which exist at the time an action is removed. *See Barney v. Latham*, 103 U.S. 205 (1881).

The decisions of this Court also demonstrate that in conflicts between federal and state practices, federal law governs. Most recently, in *Stewart Organization, Inc. v. Ricoh Corporation*, 108 S.Ct. 2239 (1988), the Court held that the determination of venue in a diversity action must be made according to federal law. There, the parties had included a choice of forum clause in their contract, but the district court, confronted with a motion to transfer under 28 U.S.C. § 1404(a), applied Alabama law which refused to enforce choice of forum clauses. This Court held that instead the motion to transfer must be evaluated under federal law. Ruling that both Congress and the State of Alabama had legislated on the same issue — venue — the Court held that federal law governed:

> The premise of the dispute between the parties is that Alabama law may refuse to enforce forum-selection clauses providing for out-of-state venues as a matter of state public policy. If that is so, the District Court will have either to integrate the factor of the forum-selection clause into its weighing of considerations as prescribed by Congress, or else to apply, as it did in this case, Alabama's categorical policy disfavoring forum-selection clauses. Our cases make clear that, as between these two choices in a single "field of operation," *Burlington Northern R. Co.*

> *v. Woods,* 480 U.S. at ____, the instructions of Congress are supreme.

Id. at 2244. (footnote omitted.) *See also Burlington Northern R. Co. v. Woods,* 480 U.S. 1 (1987) (in diversity action, federal rule was to be applied over contrary state rule concerning actions on appeal).

These decisions establish that in diversity actions, where federal and state laws cover the same subject, federal laws reign supreme. *A fortiori* that conclusion applies to questions as to the existence of diversity jurisdiction, which by definition is a creation of Congress. Accordingly, the circuits which have considered the question uniformly have ruled that the determination of citizenship for diversity purposes is controlled by *federal* law. *Mas v. Perry,* 489 F.2d 1396, 1399 (5th Cir. 1974); *Stifel v. Hopkins,* 477 F.2d 1116, 1120 (6th Cir. 1973); *Ziady v. Curley,* 396 F.2d 873, 874 (4th Cir. 1968); *City of Minneapolis v. Reum,* 56 F. 576, 581 (8th Cir. 1893). As this Court has said in other removal contexts, "the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts." *Shamrock Oil Corp. v. Sheets,* 313 U.S. 100, 104 (1941).

B. As Interpreted By The Court Of Appeals, The California Doe Practice Conflicts With Federal Law

When a case otherwise is appropriate for removal based on diversity of citizenship, the California Doe pleading practice as interpreted by the Ninth Circuit conflicts with federal law. The California practice is found in California Code of Civil Procedure Section 474 which provides in part:

> When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint . . . and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly. . . .
>
> CAL. CIV. PROC. CODE § 474 (West 1983).

As construed by California courts, this provision applies not only to ignorance of a defendant's name, however. It also applies to non-existent defendants. Thus, a plaintiff can sue a Doe but not charge him with any actionable conduct, *see, e.g., Barnes v. Wilson,* 40 Cal.App.3d 199, 205, 114 Cal.Rptr. 839, 844 (1944), and prior to suing, a plaintiff is not required to exercise reasonable diligence to discover either a Doe's identity or facts giving rise to a cause of action against a Doe. *Munoz v. Purdy,* 91 Cal.App.3d 942, 947-48, 154 Cal.Rptr. 472 (1979). As used here, therefore, John or Jane Doe is not an alias, as in *Roe v. Wade,* 410 U.S. 113 (1973) or *Doe v. Bolton,* 410 U.S. 179 (1973). It is a fiction. Prior to the Court of Appeals' opinion herein, certain Ninth Circuit decisions had branded such Does as phantoms, condemned such Doe allegations as sham, and disregarded such Does for purposes of removal based on diversity, at least where the defendant's verified petition showed them to be sham. *See, e.g., Grigg v. Southern Pacific Co.,* 246 F.2d 613 (9th Cir. 1957); *Chism v. National Heritage Life Insurance Co.,* 637 F.2d 1328 (9th Cir. 1981).

The reason that plaintiffs in state court plead Doe defendants is that plaintiffs thereby toll the statute of limitations should they later wish to add a defendant. Under California Code of Civil Procedure Section 583.210 (formerly § 581a(a)), a plaintiff has three years within which to serve any defendant — including a Doe who, at the time the Complaint was filed, was neither known nor

described nor alleged to have done anything, except in some unspecified way to have been liable for plaintiff's injury. A one-year statute of limitations for tort, CAL. CIV. PROC. CODE § 339, therefore effectively becomes four years; a four-year statute of limitations for breach of contract, Cal. Civ. Proc. Code § 337, effectively becomes seven years. If a real party *should* be named within that time period and, by amendment, take the place of a Doe, the amendment relates back to the date the Complaint originally was filed. *Clark v. Stabond Corp.,* 197 Cal.App.3d 50, 56, 242 Cal.Rptr. 676, 679 (1987).

Accordingly, in California it is universal practice for plaintiffs in state court to name large numbers of Does (here, 50 Does) and, by rote incantation, to allege merely that the names, capacities and actions of the Does are unknown, but the Does are implicated somehow, and that all defendants were agents of the others. Treatises and form books on California law regularly advise counsel to plead such Doe allegations. *See, e.g.,* R. WEIL & I. BROWN, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL § 6:58.1 at 6-10 (1985); WEST'S CALIFORNIA CODE FORMS, CIVIL PROCEDURE, § 474 at 475 (1981). Official form complaints prescribed by the California Judicial Commission contain pre-printed Doe allegations. *See, e.g.,* 10C CALIFORNIA FORMS OF PLEADINGS AND PRACTICE, at 83 (1988) (example of printed form tort complaint.) As one commentator has noted, "California counsel have no alternative but to recite the fictitious defendant ritual in each and every complaint." Hogan, *California's Unique Doe Defendant Practice: A Fiction Stranger than Truth,* 30 STAN. L. REV. 51, 103-104 (1977).

The California Doe practice implicates two concepts: joinder of defendants and relation-back of an amendment to the date of the original complaint. Neither subject,

however, addresses *who* is a defendant at the time the action is commenced. By their very nature they admit that there are no such real defendants at the time the action is commenced. Rather, both subjects address how a court proceeds when a plaintiff subsequently desires to add a defendant.

The Federal Rules of Civil Procedure also address both subjects. Rules 19-21 define joinder of defendants, and Rule 15(c) covers the relation back of an amendment to the date of the original complaint. These rules clearly govern actions *commenced* in federal court, even when diversity of citizenship forms the basis for federal jurisdiction. To say that diversity actions *removed* from state court are governed by state rules on joinder and relation-back, such that the state rules determine whether federal jurisdiction exists in the first place, is backwards: it gives the states authority to determine federal jurisdiction. Such a notion conflicts with the decisions of this Court, and guts the rationale of removal in a diversity action.

For example, this Court long ago held that the presence of formal or unnecessary parties did not defeat removability. In *Salem Trust Co. v. Manufacturers' Finance Co.*, 264 U.S. 182 (1924) the defendant trust company, a stakeholder between two competing claimants, was not of diverse citizenship with the plaintiff. Nevertheless, since the company was not necessary for an adjudication of the dispute between the claimants, the company's presence did not destroy diversity and require remand to state court. If the trust company, an actual entity already present did not destroy diversity, then a Doe defendant who does not exist at all at the time of removal cannot destroy diversity.

This Court also has firmly held that removal cannot be prevented by the fraudulent or wrongful joinder of non-diverse parties. *See, e.g., Pullman Co. v. Jenkins*, 305 U.S.

534, 541 (1939); *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *Chesapeake & Ohio R.R. Co. v. Cockrell*, 232 U.S. 146, 152 (1914) ("[T]his right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy"); *Chicago, Rock Island and Pacific Railway Co. v. Schwyhart*, 227 U.S. 184, 194 (1913); *Illinois Central R.R. Co. v. Sheegog*, 215 U.S. 308, 316 (1909) ("[I]f it appears that the joinder was fraudulent, as alleged, it will not be allowed to prevent the removal"); *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176, 185 (1907); *Alabama Great Southern Ry. Co. v. Thompson*, 200 U.S. 206, 217-18 (1906); *Louisville & N. R. Co. v. Wangelin*, 132 U.S. 599, 601-02 (1890).

> As the Court ruled in *Wilson, supra:*
> [The] right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy. [Citation omitted]. If in such a case a resident defendant is joined, the joinder, although fair upon its face, may be shown by a petition for removal to be only a sham or fraudulent device to prevent a removal. . . .

Wilson, supra, 257 U.S. at 97.

Wilson's definition of fraudulent joinder — parties joined "without any reasonable basis in fact and without any purpose to prosecute the case in good faith," *id.* at 98 — exactly describes Does at the time of removal. At that time, there is no "reasonable basis in fact" to prosecute the action against them, because there are no facts against them at all — they do not exist.

Moreover, federal law rejects the notion of a an unnamed, unidentified, non-existent Doe. For example, the federal rules on prosecuting actions in the name of the real party in interest forbid the naming of Does on the

mere possibility that some unidentified claim exists on behalf of some unknown party. FED.R.CIV.P. 17(a). Thus when Rule 17 was amended in 1966, the Advisory Committee wrote:

> The provision [that no action shall be dismissed on the ground of non-prosecution in a real party's name until reasonable time has elapsed] should not be misunderstood or distorted. . . . It does not mean, for example, that, following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real victim, and have the benefit of the suspension of the limitation period.

Advisory Committee Notes to 1966 Amendment to FED.R.CIV.P. 17. It would be anomalous for federal law to forbid suit in the name of a fictitious party, but to countenance suit against a similarly unknown party, especially for some unknown, unidentified act. Federal law indeed does not create such an anomaly. Federal Rule of Civil Procedure 11 defines a counsel's signature on a Complaint as his certificate that the complaint is "well grounded in fact" and that this conviction was "formed after reasonable inquiry." A Complaint which contains no factual allegations against a defendant cannot be well grounded in fact; a plaintiff who merely alleges that a defendant is somehow responsible for injury has not made his charge after reasonable inquiry. Moreover, the most venerable of authorities clearly contemplates that defendants be real entities. One cannot read the evaluation of "alien," "citizen" and "party" in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1807) without concluding that in

requiring complete diversity, Chief Justice Marshall was writing of real, not fictitious parties.

The California Doe practice thus inalterably conflicts with federal law. The Ninth Circuit resolved the conflict by deferring to California law. This resolution stands jurisdiction on its head. Removal based on diversity becomes meaningless if a state court can prevent it.

C. Allowing California Law To Govern Over Federal Law, As Does The Decision of the Court Of Appeals, Eviscerates Removal Based On Diversity

The rationale underlying federal diversity jurisdiction explains why a state statute cannot operate to prevent removal. Authorized by the Constitution, U.S. CONST. art. III, § 2, and implemented by statute, diversity jurisdiction represents the judgment of Congress that the federal courts can provide a neutral forum in disputes between parties from different states. From the beginning, diversity jurisdiction has protected against the perception of partiality a state court might show to its home litigants.

In his advocacy of the Constitution, Alexander Hamilton defended diversity jurisdiction on those terms:

> [I]n order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens and which, owing its official existence to the Union, will never be likely

> to feel any bias inauspicious to the principles on which it is founded.

THE FEDERALIST, No. 80, at 478 (A. Hamilton) (New Am. Library Ed. 1961). Legislation implementing the principle Hamilton so strongly advanced always has existed. *E.g.*, 1 Stat. 79 (1789); 14 Stat. 558 (1867); 18 Stat. 470 (1875); 25 Stat. 433 (1888); 36 Stat. 1091-95 (1911); 28 U.S.C. § 1332 (1958).

Congress subsequently has authorized diversity jurisdiction on the same basis as Hamilton in THE FEDERALIST. When the jurisdiction provisions were amended in 1958, for example, the Senate Report explicitly stated:

> The underlying purpose of diversity of citizenship legislation (which incidentally goes back to the beginning of the Federal judicial system, having been established by the Judiciary Act of 1789) is to provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the federal courts.

S. REP. NO. 1830, 85th Cong., 2d Sess., *reprinted in* [1958] U.S. CODE CONG. & AD. News, 3099, 3102.

Removal gives a defendant the option of transferring his case to federal court if he perceives the need for the neutral federal forum. The fact that in diversity actions he cannot remove if the action is pending in his *own* state, 28 U.S.C. § 1446(b), helps demonstrate that the very purpose is to protect against a perceived disadvantage by being forced to defend in his opponent's state court. In short, removal gives him the protection of a federal forum where there is federal jurisdiction.

It would be anomalous to allow a state pleading practice to keep the defendant in state court and prevent him from removing the action to federal court. The very

protection Congress has provided — a neutral forum in the event of perceived partiality — would be eliminated by the state which was perceived to have been partial in the first place. Congress cannot have meant to provide a right of removal from a state court only to empower a state to take the right away.

To the contrary, in numerous contexts this Court has ruled that a state cannot legislate in a way which deprives a litigant of his right to remove. In *Harrison v. St. Louis & San Francisco R.R. Co.*, 232 U.S. 318 (1914), this Court ruled that a state could not revoke a corporation's business license to prevent the corporation from asserting its right to remove an action. Nor may a state, by requiring a corporation to be licensed in that state, change the citizenship of the corporation so that diversity jurisdiction is defeated. *Southern Railway Co. v. Allison,* 190 U.S. 326 (1903); *Missouri Pacific Railway v. Castle,* 224 U.S. 451 (1912). In *Chicago & Northwestern Railway Co. v. Whitton*, 80 U.S. (13 Wall.) 270 (1872) this Court ruled that a state statute requiring that an action be brought in a state court could not defeat the right to remove. As Professor Moore notes, "[s]ince removal must rest upon a valid federal statute, a state cannot place restrictions upon the right to remove." 1A J. MOORE & B. RINGLE, MOORE'S FEDERAL PRACTICE ¶ 0.157[2] at 47 (2d ed. 1987).

Like the situation presented by these decisions, the California Doe pleading practice cannot restrict removal. Nor can it delay the time for removal, for Congress has determined that cases be removed as early as possible.

III.

CONTRARY TO THE RULING OF THE COURT OF APPEALS, THE REMOVAL STATUTES CONTEMPLATE REMOVAL AT THE EARLIEST POSSIBLE TIME.

At the time of decision by the Court of Appeals, 28 U.S.C. § 1446(b) provided in pertinent part:

> The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . .
>
> If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

With the passage of the Judicial Improvements Act, the statute will be supplemented to cap the period when an action may be removed. If an action is not removable initially, it still may become removable but only if the facts making it so appear within one year after commencement of the action. *Id.* § 1016(b)(2)(B). The thirty-day requirement for removal, however, remains the same.

With one exception, this provision for early removal has characterized removal legislation since its inception. In the Judiciary Act of 1789, for example, removal was authorized at the time the defendant made his appearance in state court. 1 Stat. 79 (1789). In modern legislation the time for removal has been as short as twenty days follow-

ing commencement of the action, 63 Stat. 89 (1949), and since 1965 has remained at 30 days.

The one exception to the history of prompt removal came during the Reconstruction Era. At a time when actions of state courts were particularly suspect, and when the removal statutes permitted removal upon the affidavit of either plaintiff or defendant that he believed that he could not receive a fair state court trial because of local prejudice, a party could remove at any time prior to trial. As Reconstruction neared its end, however, Congress amended the statute, reverting to the earlier practice of requiring earlier removal. 18 Stat. 470 (1875). The amendment passed following debate in which the lengthy delay before removal was characterized by the author of the new bill as "mischievous in its consequences." 2 CONG. REC. 4,302 (1874). Subsequently this Court construed the 1875 law as "manifest[ing] the intention of Congress that the petition for removal should be denied at the earliest possible opportunity." *Powers v. Chesapeake & Ohio Railway,* 169 U.S. 92, 100 (1898).

The Court of Appeals' opinion here, however, *insures* removal at a late stage of the litigation, guaranteeing the very "mischievous consequences" Congress rejected. Since under California law service of process on a Doe may be made as much as three years after the action begins, CAL. CIV. PROC. CODE § 583.210 (formerly § 581(a)), the 30 days within which Congress requires removal, 28 U.S.C. § 1446(b), has to be postponed that long — or perhaps longer. The Ninth Circuit rule prohibits removal unless the plaintiff drops the Doe defendants or trial commences without service of the Does. *Bryant,* 844 F.2d at 606 n.5. Thus, the three year period for service could expire, the Does could remain in the Complaint but trial nevertheless might not occur until sometime later — and the case still would not be removable

until the trial commences. This is not mere conjecture; the time to trial in Los Angeles Superior Court, for example (the court from which the within action was removed) often is longer than three years. *See, e.g.,* Judicial Council of California, 1988 ANNUAL REPORT at 103.

Even if the presence of Does could prevent removal based on the Complaint, the Ninth Circuit's rule that removability is foreclosed entirely until the Does are named, dismissed or voluntarily abandoned cannot be reconciled with the statutes. The statutes do not limit removal to cases where parties are dropped or trial has commenced. Rather, they authorize removal at any time within 30 days of receipt of "an amended pleading, motion, order or other paper" disclosing that a case has become removable. 28 U.S.C. § 1446(b). This Congressional language covers a variety of circumstances, ranging from answers to interrogatories or requests to admit to letters to papers filed in state court. Numerous cases show that diversity can be uncovered under just such circumstances. *Barngrover v. M.V. Tunisian Reefer,* 535 F.Supp. 1309 (C.D. Cal. 1982); *Miller v. Stauffer Chemical Co.,* 577 F.Supp. 775 (D. Kan. 1981); *Lee v. Altamil Corp.,* 457 F.Supp. 979 (M.D. Fla. 1978); *Camden Industries Co. v. Carpenters Local Union, etc.,* 246 F.Supp. 252 (D. N.H.), *aff'd.* 353 F.2d 178 (1st Cir. 1965); *Fisher v. United Airlines, Inc.,* 218 F.Supp. 223 (S.D.N.Y. 1963). Under the Ninth Circuit's rule, all these must be disregarded. The statute makes clear that Congress intended otherwise.

The provision for removability as disclosed by "other papers" was added to the statute in 1949, and recognizes that there must be an exception to early removal when facts discovered after the action has been commenced may make the action removable. The legislative history discloses that the amendment was declaratory of existing

law. H.R.REP. No. 352, 81st Cong., 1st Sess. (1949), *reprinted in* [1949] U.S. CODE CONG. SERV. 1254, 1268. Even when these exceptions arise, however, removal must occur quickly — within 30 days — or not at all. The Ninth Circuit rule wrongly added its own language to the statute, by using "abandonment" and "dismissal" of the Does in place of the language Congress enacted.

IV.

CONTRARY TO THE RULING OF THE COURT OF APPEALS, A DIFFERENT STANDARD APPLIES FOR APPELLATE REVIEW OF A JUDGMENT THAN FOR DISTRICT COURT DECISION ON A MOTION TO REMAND.

The Ninth Circuit's decision also conflicts with the statutes and decisions of this Court because it applies the same rule both before and after judgment. The statutes and decisions of this Court, however, establish different standards before and after judgment. Prior to the recent Congressional bill, 28 U.S.C. § 1447(c) provided that "if *at any time before final judgment* it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case." (Emphasis added). Following amendment the statute will provide that the case shall be remanded "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction." Judicial Improvements Act, § 1016(c)(1). With or without amendment, the statute clearly differentiates between the status of a case before and after judgment. It is only *before* judgment that remand must occur.

Following judgment, the question is not whether jurisdiction existed at the time of removal, but whether it existed at the time of judgment. In *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972), this Court held

that regardless of whether a case has been properly removed, if judgment has been rendered, and if the district court had diversity jurisdiction as between the parties governed by the judgment, the fact that there were other parties with other claims did not defeat the jurisdiction of the district court to enter judgment. *Grubbs* held that "[w]hile of course Texas is free to establish such rules of practice for her own courts as she chooses," the language of Congress was paramount, and that Congress intended that the removal statutes should be applied uniformly nationwide. *Id.* at 705.

In determining that appellate review should focus on the status of the case as of the time of judgment, one of the telling points in *Grubbs* was that the plaintiff had made no attempt to remand the case or otherwise challenge the district court's jurisdiction. *Id.* at 701. Thus, whereas the impropriety of removal might have been raised before judgment, it could not be raised following judgment. The failure to object to removal or move for remand has been a telling point in earlier decisions of this Court as well. *See, e.g., Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97-98 (1921).

Under these authorities, even if the existence of Does should have prevented removal, the subsequent conduct of a case can demonstrate that, as of the time of judgment, diversity jurisdiction nevertheless existed. Here, for example, the verified petition alleging the Does were sham went unanswered. Bryant served no parties other than Ford within 120 days, as provided in Federal Rule of Civil Procedure 4(j), notwithstanding that the federal rules govern in removed actions. Fed. R. Civ. P. 81(c). The district court entered judgment without considering the Does. The district court made explicit, in denying Bryant's motions for relief under Federal Rule of Civil Procedure 60(b), that it did *not* consider the Does to be

real parties, and that there was no excuse for plaintiffs not having moved for joinder prior to judgment. The district court emphasized that Bryant had not objected to removal or moved for remand. It is true that the court did not enter a formal order dismissing the Does, but it did clearly disregard them for the purposes of entering judgment. It is inconsistent with *Grubbs* and *Wilson* to hold that despite all this, the mere absence of a formal order dismissing the Does meant that jurisdiction did not exist at the time of judgment.

The effect of the Court of Appeals' ruling is that a post-judgment motion to add parties, which was the only time Bryant sought to add parties, vitiates a judgment. That decision is at odds with the authority vested in the district court by Federal Rule of Civil Procedure 60(b) to evaluate post-judgment motions for relief, and the *Grubbs* holding of finality based on jurisdiction as of the time of the judgment.

V.

THE REMOVAL STATUTES DO NOT ALLOW REMAND FOR THE PURPOSE OF ADMINISTRATIVE EASE.

The theme underlying the Ninth Circuit's bright-line rule is one which has been rejected by this Court: administrative convenience. The Ninth Circuit crafted a rule because of perceived confusion caused by its earlier decisions. It adopted the rule that would be most convenient to apply. The question, however, is whether federal jurisdiction exists; administrative ease is not a proper basis for decisions on removal and remand. *Thermtrom Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). The one point on which the majority and dissent in *Thermtrom* agree is that the contours of removal and remand are set by Congress. Those contours cannot be changed by a

court's desire to fashion its own rules. *See, e.g., United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965) (although union, an unincorporated association had many of the attributes of a corporation, Congress had not defined its citizenship the same and thus it was not to be treated the same).

On numerous occasions, and as recently as the latest term, Congress has considered legislative changes to the statutes which would abolish diversity of citizenship jurisdiction. *See* H.R. 9622, 95th Cong. (1978); H.R. 2202, 96th Cong. (1979); H.R. 6816, 97th Cong. (1982); H.R. 3152, 100th Cong. (1987). These proposals cover removal, too. None of these proposals has become law. Administrative ease cannot justify effecting changes in those very rules which Congress itself so far has been unwilling to modify.

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed or vacated, and the judgment of the district court reinstated.

Dated: November 17, 1988

Respectfully submitted,

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APPENDIX A
STATUTES INVOLVED

28 U.S.C. § 1332

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States; . . .

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . .

28 U.S.C. § 1441

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim of right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed

and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction . . .

28 U.S.C. § 1446

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable. . . .

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be deter-

mined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition for the removal of the civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded . . .

28 U.S.C. § 1447

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

CAL. CIV. PROC. CODE § 474

When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly; provided, that no default or default judgment shall be entered against a defendant so designated, unless it appears that the copy of the summons or other process, or, if there be no summons or process, the copy of the first pleading or notice served upon such defendant bore on the face thereof a notice stating in substance: "To the person served: You are hereby served in the within action (or proceedings) as (or on behalf of) the person sued under the fictitious name of (designating it)." The certificate or affidavit of service must state the fictitious name under which such defendant was served and the fact that notice of identity was given by endorsement upon the document served as required by this section. The foregoing requirements for entry of a default or default judgment shall be applicable only as to fictitious names designated pursuant to this section and not in the event the plaintiff has sued the defendant by an erroneous name and shall not be applicable to entry of a default or default judgment based upon service, in the manner otherwise provided by law, of an amended pleading, process or notice designating defendant by his true name.

CAL. CIV. PROC. CODE § 583.210 (West, 1988) (formerly § 581a(a)

(a) The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this

subdivision an action is commenced at the time the Complaint is filed.

(b) Return of summons or other proof of service shall be made within 60 days after the time the summons and complaint must be served upon a defendant.

APPENDIX B

JUDICIAL IMPROVEMENTS AND ACCESS TO JUSTICE ACT (1988)

SEC. 1016. IMPROVEMENTS IN REMOVAL PROCEDURE.

(a) ACTIONS REMOVABLE GENERALLY. — Section 1441(a) is amended by adding at the end thereof the following new sentence: "For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded".

(b) PROCEDURE FOR REMOVAL. — Section 1446 is amended —

(1) by amending subsection (a) to read as follows:

"(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action";

(2) in subsection (b) —

(A) by striking out "petition for removal" each place it appears and inserting in lieu thereof "notice of removal"; and

(B) in the second paragraph by striking out the period at the end thereof and inserting in lieu thereof ", except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action"; and

(3) by striking out subsection (d) and redesignating subsections (e) and (f) as subsection (d) and (e), respectively.

(c) PROCEDURE AFTER REMOVAL GENERALLY. — Section 1447 is amended —

(1) by amending subsection (c) to read as follows:

"(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case"; and

(2) by adding at the end thereof the following new subsection:

"(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court."

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 17, 1988, I served the within Brief for Petitioner in re: "Ford Motor Company v. Gary Bryant" in the United States Supreme Court, October Term 1988, No. 88-97 and Joint Appendix Filed Under Separate Cover Thereto;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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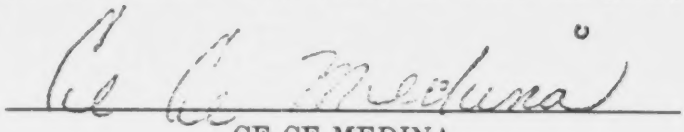
All Parties required to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on November 17, 1988, at Los Angeles, California



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